> Assume that you estimate that you will have earned 20 Years of Credited Service when you retire at age 60 (your Normal Retirement Age) in 1999, and that your Unit Multiplier is $35. Multiplying 20 Years of Credited Service by the Unit Multiplier of $35 results in the monthly lifetime benefit of $700.

(App. 66a)

Example 2 specifically addressed the calculation of normal retirement benefits based on the Freight Level contribution rate schedule, and provided as follows:

> *Assume that your Employer contributed at the National Master Freight Level contribution rate schedule* on your behalf, and you estimate that you will have earned 20 continuous Years of Credited Service when you retire at age 60 on January 1, 1999. Multiplying 20 Years of Credited Service *by the Unit Multiplier (for the stated time periods) stated on Table 3*, results in the monthly lifetime benefit of $1,531.50.

(Emphasis added) (App. 66a-67a)

The District Court, in concluding that the Pension Fund Trustees' method of calculating the Petitioners' monthly benefits was reasonable and supported by substantial evidence, specifically found that contributions were made to the Pension Fund on the Petitioners' behalf at the Freight Level, and that of the two Examples, Example 2 was the relevant one to explain the calculation of the Petitioners' monthly benefits.

> Significantly, in advising participants how to estimate the computation of their monthly normal retirement benefit, the 1999 SPD [page numbers omitted] provides [Example 2]. . . .

> [Example 2] in the SPD undercuts the plaintiffs' argument that the Trustees erred in applying various unit multipliers to calculate their monthly benefits instead of applying the last unit multiplier in effect at their termination dates. Section 4.4(a) of the Plan expressly provides that the unit multiplier is "determined in accordance with Appendix A" as of the "Participant's Termination Date" and in calculating the benefits for Mr. Otto and Mr. Grove, *the Pension Fund Actuary utilized the Freight Level unit multipliers in accordance with Appendix A, as summarized in the 1999 SPD at Table 3.*
>
> (Emphasis added) (App. 34a-35a)

In affirming the District Court, the Third Circuit also found that Example 2 was the relevant benefit calculation example.

> . . . [Example 2] illustrates the calculation methodology employed by the Fund in determining Appellants' benefits. Because this example is included in the summary plan description, it represents an authoritative interpretation of Section 4.4(a) and is binding on both the trustees and the plan participants. *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. And Research Found.*, 334 F.3d 365, 382 (3d Cir. 2003) (holding summary plan description is a binding element of the plan). In sum, the trustees' methodology is a reasonable interpretation of Section 4.4(a) and is consistent with the approach explained in the summary plan description.
>
> (App. 9a)

The record is clear that the Courts below considered the two Examples provided in the SPD, and correctly

concluded that Example 2 was the relevant example, because it specifically summarized the calculation of the Petitioners' monthly benefits based on the Freight Level contribution rate schedule. Example 1 was not relevant because it did not address the calculation of normal retirement benefits based on the Freight Level contribution rate schedule. The Courts below fully reviewed the Petitioners' claim that the two Examples were ambiguous or contradictory and found the claim to be without merit. The resolution of this factual dispute by the Courts below was fully consistent with established law and further review is not warranted.

2. THE PETITIONERS' ATTEMPT TO ARTICULATE A SPLIT AMONG THE CIRCUIT COURTS CONCERNING THE APPLICATION OF THE PRINCIPLE OF CONTRA PROFERENTUM IS CONTRIVED AND WITHOUT MERIT.

Assuming arguendo that the two examples in the SPD were ambiguous or contradictory, Petitioners contend that the Third Circuit created a split among the Circuit Courts by not applying the principle of contra proferentum and resolving the ambiguity or contradiction in the Petitioners' favor. (Petition 7-9) This claim is without merit, and the Petitioners' attempt to demonstrate a split among the Circuit Courts is wholly contrived.

The Third Circuit has not applied contra proferentum where the plan administrator has discretion to interpret the terms of the multiemployer benefit plan and the standard of review is the arbitrary and capricious standard. *Ceccanecchio v. Cont'l Case Co.*, 50 Fed. Appx. 66, 73 (3d Cir. 2002). Although the Third Circuit has applied contra proferentum to the construction of a medical

insurance program, *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257 (3d Cir. 1993), it has not applied contra proferentum where the plan at issue was the product of collective bargaining. *Courson v. Bert Bell NFL Player Retirement Plan*, 75 F.Supp. 2d 424, 432 (E.D. Pa. 1999), *affirmed*, 214 F.3d 136 (3d Cir. 2000).

The Third Circuit's position that contra proferentum should not be applied to interpret a benefit plan under the arbitrary and capricious standard of review is in full accord with the other Circuit Courts. *See e.g., Caidor v. Chase Manhattan Bank*, 29 Fed. Appx. 704, 706 (2d Cir. 2002); *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999); *Cagle v. Bruner*, 112 F.3d 1510, 1519 (11th Cir. 1997); *Morton v. Smith*, 91 F.3d 867, 871, fn. 1 (7th Cir. 1996); *Winters v. Costco Wholesale*, 49 F.3d 550, 554 (9th Cir. 1995), *cert. denied*, 516 U.S. 908 (1995).

The cases cited by the Petitioners do not support the claim of a split among the Circuit Courts in applying contra proferentum in cases involving the application of the arbitrary and capricious standard of review to multiemployer benefit plans. *Chiles v. Ceridian Corp.*, 95 F.3d 1505 (10th Cir. 1996), involved a potential conflict between the provisions of a long term disability plan and a summary plan description, which the Court evaluated under a de novo standard of review. *Haymond v. Eighth Dist. Elec. Benefit Fund*, 36 Fed. Appx. 369 (10th Cir. 2002) (a non-precedential opinion) involved a summary plan description that was found to be both ambiguous and contradictory, and the case was resolved under the de novo standard of review. *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir. 1991) involved an ERISA-governed insurance plan, not a pension plan. Lastly, the Fifth Circuit has applied contra proferentum only in ERISA cases construing

insurance policies, and then only as part of its unique two-step approach to applying the abuse of discretion standard. *Kimber*, 196 F.3d at 1101. *See McCall v. Burlington Northern Santa Fe Co.*, 237 F.3d 506, 512 (5th Cir. 2000), *cert. denied*, 534 U.S. 822 (2001); *Rhorer v. Raytheon Engineers and Constructors, Inc.*, 181 F.3d 634, 639-40 (5th Cir. 1999).

The argument in Section 1 demonstrated that the Courts below correctly determined that Example 2 in the SPD accurately reflected the calculation of the Petitioners' monthly benefits, and that Example 1 was not relevant to the calculations. However, assuming that the two examples were ambiguous or conflicting, the Third Circuit, in applying the arbitrary and capricious standard of review, was not required to apply contra proferentum to resolve such an ambiguity or contradiction. The Third Circuit's decision is fully consistent with the Circuit Courts which have considered this issue, and no further review is warranted.

3. THE COURT OF APPEALS DID NOT ERR IN FINDING THAT THE RESPONDENTS' INTERPRETATION OF AN AMBIGUOUS PLAN PROVISION WAS REASONABLE.

The Petitioners contend that the Third Circuit committed error in finding that a phrase in Section 4.4(a) of the Pension Plan was ambiguous, and by resolving the ambiguity in favor of the Pension Fund. (Petition 9-11)

In reviewing the provisions of Section 4.4(a), the Third Circuit noted that the District Court "implicitly concluded Section 4.4(a) is ambiguous, then expressly held that the

Fund's interpretation is reasonable." (App. 8a, fn. 5) The Third Circuit stated further that:

> Notwithstanding the parties' "plain meaning" arguments, Section 4.4(a) is ambiguous. [Footnote omitted] It simply does not speak to the relevant question – whether monthly pension benefits are calculated using a single "unit multiplier" corresponding to the applicant's last employer contribution rate, or using a variety of "unit multipliers" corresponding to the contribution rate at the relevant employment termination dates. [Footnote omitted] Faced with an ambiguous provision, we review whether the trustees' interpretation is reasonable. [*Bill Gray Enters., Inc. Employee Health and Welfare Plan v. Gourley*, 248 F.3d 206, 218 (3rd Cir. 2001)]

(App. 8a-9a)

After reviewing the record and the District Court's findings, the Third Circuit concluded that "[i]n sum, the trustees' methodology is a reasonable interpretation of Section 4.4(a) and is consistent with the approach explained in the summary plan description." (App. 9a)

The District Court reviewed the Trustees' actions in interpreting Section 4.4(a) pursuant to the arbitrary and capricious standard, based on the finding that the Pension Fund's documents granted the Trustees broad discretionary power in administrating the Pension Fund and making eligibility determinations. (App. 29a-31a) The Third Circuit found that the arbitrary and capricious standard was correctly applied by the District Court. (App. 7a)

The Third Circuit's review of the ambiguous phrase or words in Section 4.4(a), and the resolution of the ambiguity by finding that the Trustees' actions in interpreting

Section 4.4(a) were reasonable, was fully consistent with established federal law. It is well settled that under the arbitrary and capricious standard of review "[i]f the reviewing court determines the terms of a plan document are ambiguous, it must take the additional step and analyze whether the plan administrator's interpretation of the document is reasonable." *Bill Gray Enters., Inc. Employee Health and Welfare Plan v. Gourley*, 248 F.3d 206, 216 (3d Cir. 2001). The finding of the Third Circuit that the Trustees' interpretation of Section 4.4(a) was reasonable, including the Trustees' interpretation of the meaning of "Participant's Termination Date" and other words and phrases in Section 4.4(a), was correct and in accord with past precedents. Accordingly, this Court should deny the Petition For Writ Of Certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Court should deny the Petition For Writ Of Certiorari.

Respectfully submitted,

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